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July 17, 1997

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Reply of Ameritech New Media, Inc. in RM No. 9097

Dear Mr. Caton:

Enclosed please find the original and nine copies of the Reply of Ameritech New Media, Inc. in the Petition for Rulemaking to Amend 47 C.F.R. § 76.1003 -- Procedures for Adjudicating Program Access Complaints in RM No. 9097.

Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition for Rulemaking to Amend 47 C.F.R. § 76.1003--Procedures for Adjudicating Program Access Complaints	)	RM No. 9097

To: Cable Services Bureau

REPLY OF
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July 17, 1997

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To: Cable Services Bureau

REPLY OF
AMERITECH NEW MEDIA, INC.

Pursuant to Section 1.405(b) of the Commission's rules,[1/] Ameritech New Media, Inc. ("Ameritech") hereby files its Reply to the Statements in support of and in opposition to its Petition for Rulemaking ("Petition") filed on May 16, 1997. The record before the Commission clearly warrants the issuance of a Notice of Proposed Rulemaking ("NPRM") encompassing the three changes to the program access rules, 47 C.F.R. § 76.1003, urged by Ameritech in its Petition: (1) a deadline for decisions on complaints; (2) a right to discovery; and (3) economic penalties in the form of fines or damages to discourage violation of Section 628 of the Communications Act of 1934 by cable operators and programmers.

1/ 47 C.F.R. § 1.405(b).

I. INTRODUCTION AND SUMMARY.

The roster of parties supporting and opposing, respectively, Ameritech's Petition is, in and of itself, testament to the need for the rules changes Ameritech seeks. Companies endeavoring to bring meaningful competition to the multichannel video programming distribution ("MVPD") marketplace and who are the intended beneficiaries of the protections conferred by Congress in Section 628, together with public interest organizations speaking on behalf of viewers across America, support the Petition;[2/] the incumbent cable industry opposes it.[3/]

The essence of the incumbent cable industry's opposition is a counter-intuitive defense of the status quo. They perceive an MVPD marketplace where competition is developing nicely,[4/] competing MVPDs have access to the programming they desire[5/] and the program access rules are working well and as intended.[6/]

The Commission, however, cannot accept this rosy scenario. It is faced with a starkly different reality, one marked by

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2/ See Comments of the Wireless Cable Association International, Inc.; DIRECTV, Inc.; Corporate Media Partners d/b/a Americast; and Media Access Project on behalf of Consumer Federation of America.

3/ See Comments of National Cable Television Association ("NCTA"); Time Warner Cable; Home Box Office; and Rainbow Media Holdings, Inc.

4/ See, e.g., Opposition of NCTA at 3, 11; Opposition of Time Warner at 3-4.

5/ See, e.g., Opposition of Time Warner at 4.

6/ See, e.g., Opposition of Rainbow at 3; Opposition of NCTA at 3.

profound disappointment on the part of Congress that meaningful competition to cable is not blossoming as envisioned when Congress enacted the Telecommunications Act of 1996,[7/] swelling public concern over cable rate increases[8/] and increasing consolidation and concentration in the cable industry marked by new relationships with the potential for destructive anticompetitive behavior.[9/] Indeed, as the Commission itself has recognized, competition to cable remains embryonic:

> In all but a few local markets for the delivery of video programming the vast majority of consumers still subscribe to the service of a single incumbent cable operator. The resulting high level of concentration, together with impediments to entry and product differentiation, mean that the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators.[10/]

Against this backdrop, the incumbent cable industry's "do nothing" prescription is a non-starter. Instead, the Commission should issue an NPRM proposing adoption of the rules changes

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7/ See Hearing Before the Senate Committee on Commerce, Science & Transportation On The Status of Competition In The Video Marketplace, 105th Cong., 1st Sess. (April 10, 1997) (Opening Statement of Chairman John McCain).

8/ See, Manuel Perez-Rivas, Cable Rates Not a Hit in Montgomery, *Washington Post* at A1, May 22, 1997. ("According to the Labor Department, cable rates outpaced the inflation rate last year by 2 to 1."); Cable: Paying Green, Seeing Red, *Washington Post* at Editorial Section at A22, May 4, 1997; Ted Hearn, Cable Faces Rate Backlash in D.C., *Multichannel News* at 2, May 26, 1997.

9/ See Comments of Wireless Cable Assn. at 3-8.

10/ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming in FCC 96-496 at ¶ 128 (Jan. 2, 1997) (Third Annual Report in CS Docket 96-133) [hereinafter referred to as "Third Annual Report"].

advocated in the Petition. These changes would strengthen competitive forces in the MVPD marketplace and bring the Commission's procedures and remedies in Section 628 complaints in line with the strong, substantive provisions of the law.

Issuance of an NPRM would afford the Commission an opportunity to develop a complete record on how its program access rules are working and might generate additional proposals for the Commission to consider in recrafting the rules. Unquestionably, the broad support for Ameritech's Petition warrants the Commission proceeding to the next step and releasing an NPRM encompassing the issues raised by Ameritech as well as other issues which might be appropriate.

II. OPPONENTS' ARGUMENT THAT AMERITECH'S PRESENCE IN A NUMBER OF COMMUNITIES, PROVIDING HEAD-TO-HEAD COMPETITION TO INCUMBENT CABLE OPERATORS, EVIDENCES THE SUCCESS OF THE COMMISSION'S PROGRAM ACCESS RULES IS A NON SEQUITUR.

Opponents of Ameritech's Petition make much of Ameritech's successful entry into the MVPD market, arguing that Ameritech's experience demonstrates the adequacy of the Commission's program access rules.[11/] Such an argument is a non sequitur. Access to quality programming is not a prerequisite to obtaining a cable franchise, but it is indispensable to successful operation of a cable service.

Ameritech's securing of forty-five franchises does not demonstrate that Ameritech is receiving access to the type of

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11/ Time Warner Comments at 4; NCTA Comments at 3.

quality programming intended by Section 628, nor does it demonstrate at all that this access is at nondiscriminatory rates, terms and conditions, as required by Section 628. Far more telling is the contrast in Ameritech's ability to attract subscribers in communities where Ameritech has access to the full complement of programming it wants to offer subscribers with Ameritech's experience when it is precluded by exclusive contracts or otherwise from offering key programming, such as HBO. Ameritech's experience corroborates what Congress knew when it enacted Section 628: access to programming is indispensable to competition with incumbent cable operators.

Rather, this still relatively limited market penetration merely evidences Ameritech's willingness to undertake the challenge presented when Congress repealed the telephone company-cable cross-ownership prohibition by its enactment of the Telecommunications Act of 1996.[12/] Congress hoped that telephone companies would enter the video marketplace because it viewed them as most likely to become genuine competitors to incumbent cable operators and best situated to provide meaningful competition. Ameritech, by its expenditure of considerable financial and other resources, has clearly demonstrated its commitment to become a competitive cable provider.

The objective of Ameritech's Petition is to improve the access to programming procedures and enforcement mechanisms so that the Commission's rules will be procompetitive rather than

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12/ 47 U.S.C. § 571.

accomplices of the unacceptable status quo. As currently structured, the rules permit a harmfully long period to elapse before the Commission resolves program access complaints, fail to provide complainants with discovery as of right necessary to prove discriminatory pricing claims and create no economic disincentives for violating Section 628. Ameritech's Petition seeks to remedy each of these weaknesses in the rules.

The appropriate test of the need for these changes is not the measure of success Ameritech has experienced to date in its obtaining franchises[13/] but rather how much more robust competition would be in the MVPD marketplace if the FCC's Section 628 practices and remedies actually encouraged competition. That is the import of the support Ameritech's Petition has received from competitive providers such as DIRECTV and wireless cable.

III. THE COMMISSION'S PREVIOUS CONSIDERATION OF ISSUES RAISED BY THE PETITION IS NOT A BAR TO THE COMMISSION GRANTING THE PETITION

The incumbent cable industry also relies heavily on the Commission's previous consideration of some of the issues raised by the Petition within the context of the Commission's annual review of video competition as a basis for contending that the

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13/ The fact the Commission disposed relatively expeditiously of Americast's Section 628 complaint involving access to HBO is similarly not probative of the need for these rules changes. That case largely revolved around discrete legal issues and did not contain the factual complexity which would be involved in a discriminatory pricing complaint where discovery would be essential.

Petition should be denied.[14/] Once again, this argument proves nothing.

The time is now ripe for the proposed rules changes for three principal reasons. First, the failure of widespread, meaningful competition to take root in the video marketplace is becoming increasingly evident with the passage of time. As the Commission observed in its Third Annual Report, the cable industry still accounts for eighty-nine percent of all MVPD subscribers,[15/] and the growth in cable subscribers in the last year kept pace with the growth in all other MVPD subscribers combined.[16/] While enactment of Section 628 of the 1992 Cable Act and repeal of the cable-telephone company cross-ownership prohibition in the Telecommunications Act of 1996 were absolutely critical measures to create competition, it is clear from the growing congressional and public dissatisfaction with the slow pace of developing competition that more has to be done. The rules changes proposed by Ameritech would provide another and much needed boost to competition in the video marketplace. In particular, the availability of fines or damages as a matter of course for Section 628 violations and the availability of discovery as of right would alter the mindset of cable programmers and operators. The consequences of violating Section

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14/ See, e.g., NCTA Opposition at 2; Time Warner Opposition at 2, 5.

15/ Third Annual Report at ¶ 131.

16/ Id. at ¶ 4.

628 would become far more serious than they are under the current rules and would impel potential violators to follow the law rather than test its limits.

Second, contrary to the cable industry's contention that nothing has changed to warrant revisiting the issues raised by the Petition,[17/] there are highly significant, new marketplace developments which pose a threat to the protections afforded by Section 628. As the Wireless Cable Association observed,[18/] the accelerating trend toward consolidation in the cable industry at both the national and regional levels and the transformation of NewsCorp from a potential major competitor to cable into a principal partner of cable portend potentially increased difficulties for alternative MVPDs to obtain critical cable programming at nondiscriminatory rates and on nondiscriminatory terms and conditions. Additionally, as DIRECTV observed,[19/] recent reports of a shift from satellite delivered to fiber optic delivered cable programming raises the spectre of circumvention of Section 628 altogether. These recent marketplace changes warrant a rebalancing of the FCC's procedures and remedies in Section 628 proceedings in favor of a more procompetitive approach.

Third, future program access complaints are likely to focus increasingly on discriminatory pricing and practices. As

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17/ See NCTA Opposition at 5.

18/ Wireless Cable Ass'n. Comments at 3-9.

19/ DIRECTV Comments at 3.

alternative MVPDs launch their services and get past the initial startup hurdles, they are likely to be far less willing to accept discriminatory rates as the price for securing access to programming.[20/] The reason is simple. If competing video programming providers are compelled to pay substantially and unjustifiably higher rates for programming than the incumbent cable operator, they will soon find themselves with a Hobson's choice. They either will have to endure artificially and unsustainably low profit margins or pass on the higher programming costs to their subscribers which, in turn, will weaken their competitive posture vis-a-vis cable and deprive consumers of one of the principal benefits they should derive from competition, i.e., lower prices. The increased complexity and difficulty of proving price discrimination cases under Section 628 requires that discovery as a matter of right be available to complainants. Thus, as companies move beyond the initial stages of competitive entry into the MVPD market, these rule changes will become very important to sustaining competition.

IV. ADOPTION OF THE RULES CHANGES REQUESTED BY AMERITECH IN ITS PETITION WILL NOT UNDULY TAX THE COMMISSION'S RESOURCES BUT RATHER WILL ENSURE THEIR IMPROVED UTILIZATION.

Opponents of Ameritech's Petition voice great concern that the proposed rules changes will unduly burden the Commission's scarce resources. That is just not accurate. In fact, the

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20/ DIRECTV implicitly acknowledges that it has been paying unreasonably high rates for programming. DIRECTV Comments at 2.

opposite is the case: the rules changes will facilitate more efficient use of precious Commission resources.

The rules changes urged by Ameritech must be considered together for purposes of assessing their potential impact on the Commission's resources. Were the Commission to make clear that it will levy fines or award damages for violations of Section 628, as Ameritech requests, the economic disincentives for violating the law would be substantial and concrete. Under the Commission's current rules, with no explicit provision for fines or damages, it is more profitable for cable programmers or operators to violate the law than to obey it. Changing the rules to provide for fines or damages will provide the teeth to the program access rules needed to deter anticompetitive behavior. If anticompetitive abuses decline as a consequence of these rules changes, the Commission actually will conserve resources because there will be fewer Section 628 complaints to process in the first instance.

Similarly, the imposition of strict deadlines for resolution of Section 628 complaints and the availability of discovery as a matter of right are conducive to more efficient use of the Commission's resources. Quicker disposition of Section 628 complaints need not entail more work for Commission staff. Indeed, the tight deadlines would give the Commission staff the ability to compel the parties to these proceedings to refrain from engaging in dilatory tactics.

Moreover, as the Wireless Cable Association points out in its Comments in support of Ameritech's Petition, discovery as a matter of right is less demanding on Commission staff than the current structure of the rules which provides for direct staff involvement in discovery.[21/] As is the case with discovery under the Federal Rules of Civil Procedure, the burden of conducting and concluding discovery in a timely fashion rests primarily with the parties. While their resources may be strained, those of the Commission should not be. Moreover, Ameritech's proposal for expedited discovery consistent with a five month deadline for deciding cases in which discovery occurs militates against protracted disputes in the discovery process and tends to reduce Commission involvement.

V. OPPONENTS' ARGUMENTS AGAINST DISCOVERY AS OF RIGHT ARE BASELESS AND THUS DEMONSTRATE HOW ESSENTIAL DISCOVERY IS IN SECTION 628 PROCEEDINGS.

The incumbent cable industry trots out a parade of horribles in an attempt to deter the Commission from adopting Ameritech's request to allow for discovery as a matter of right in Section 628 proceedings. They claim it will lead to time consuming and expensive fishing expeditions,[22/] create problems regarding confidentiality of sensitive pricing information[23/] and turn

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21/ See Comments of Wireless Cable Ass'n. at 10-11.

22/ NCTA Opposition at 7; Home Box Office Opposition at 7.

23/ Time Warner Opposition at 9-10; Home Box Office Opposition at 7-8.

Section 628 proceedings into full-blown antitrust actions.[24/] These arguments are striking solely because of their incredulity.

The incumbent cable industry reacts to discovery as if it were a novel and unproven concept. Discovery as a matter of right is provided for in the Federal Rules of Civil Procedure,[25/] and is integral to the conduct of modern civil litigation. It is a critical part of dispute resolution because it is the primary mechanism available to complainants to prove allegations of unlawful or wrongful behavior. Discovery is most needed when information essential to establishing the impropriety of a defendant's conduct rests within the exclusive possession of the defendant. Precisely that situation is presented by Section 628 complaints alleging violation of the prohibition against discriminatory pricing.[26/] In such cases, a comparison of the rates being charged to the complainant with the rates being charged to competing video programming distributors is critical to establishing the violation. Discovery, at least in the form of document production, is necessary to undertake this analysis. There is no sound reason why it should not be available as of right.

There are well established means of safeguarding against the potential abuses in the discovery process conjured up by the cable industry. Ameritech's Petition calls for expedited conduct

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24/ Rainbow Opposition at 6.

25/ See Ameritech Petition at 18.

26/ Id.; See also Wireless Cable Ass'n. Comments at 11-12.

of discovery, i.e., all discovery would be concluded within 45 days of the initial status conference. Such a limited time frame for discovery is a built-in safeguard against "time consuming and expensive" fishing expeditions. Protective orders, used widely in courts and at the FCC,[27/] would be available to protect commercially sensitive pricing information. Again, the tight deadlines for decision proposed by Ameritech would ensure that discovery as of right would not lead to "full-blown" litigation in the context of a Section 628 proceeding.

Ameritech respectfully suggests that the cable industry's adamant opposition to discovery as of right in Section 628 proceedings can be explained only by the fact that discovery removes the veil of secrecy which is indispensable to discriminatory pricing practices. If this change were made to the Commission's rules, it would greatly increase the potency of the Section 628 complaint process as a deterrent to anticompetitive practices by cable programmers and operators.

VI. THE COMMISSION HAS THE AUTHORITY TO AWARD DAMAGES AND LEVY FINES.

Both Time Warner and Home Box Office question the Commission's authority to award damages.[28/] Time Warner cites no authority for this proposition while Home Box Office cites

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27/ See, e.g., 47 C.F.R. § 1.731; 47 C.F.R. § 76.1003(h).

28/ Time Warner Comments at 10-11; Home Box Office Comments at 12.

only a case involving punitive damages. However, Ameritech's Petition makes no reference to punitive damages.[29/]

The Commission has previously concluded that "this authority [conferred by Section 628] is broad enough to include any remedy the Commission reasonably deems appropriate, including damages."[30/] The Commission reasoned that nothing in the statute limits the Commission's authority to decide what constitutes an "appropriate remedy", and "damages" clearly come within the definition of "remedy".[31/] In addition, the breadth of the Commission's interpretation of its authority pursuant to Section 628 is fully consistent with authority found elsewhere in the Communications Act of 1934, as amended, to award monetary damages to victims of communications law violations.[32/]

29/ Ameritech Petition at 19 - 24.

30/ Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming Distribution and Carriage), 10 FCC Rcd 1902, 1911 (1994) (Memorandum Opinion and Order on Reconsideration of the Program Access Order) [hereinafter "First Reconsideration Order"].

31/ First Reconsideration Order, at 1910 (citing Black's Law Dictionary, (4th ed. 1968).

32/ See, 47 U.S.C. § 207; See also, Comark Cable Fund III d/b/a/ CCI Cablevision v. Northwestern Indiana Telephone Company, Inc. and Northwest Indiana CATV, Inc. d/b/a/ Northwestern Indiana Cablevision, 100 FCC 2d 1244, 1257 (1985) (found that plaintiffs were entitled to an award of consequential damages); TPI Transmission Services Inc. v. Puerto Rico Telephone Company, 4 FCC Rcd 2246, 2247 n.19 (1989) (Commission noted that it had authority to award damages against Puerto Rico Telephone Company in an appropriate case even if it is a connecting carrier.)

VII. OTHER ARGUMENTS RAISED BY OPPONENTS OF THE PROPOSED RULE CHANGES ARE UNAVAILING.

A. No Negative Inferences Can Be Drawn From Congress' Failure To Mandate These Reforms To the Commission's Section 628 Procedures.

Opponents of Ameritech's Petition suggest that Congress is not dissatisfied with the FCC's enforcement of the program access rules because it had an opportunity to make changes to them when it enacted the Telecommunications Act of 1996, but did not do so.[33/] In essence, opponents want the Commission to read substance into Congress' silence. It is well recognized that such an argument is a weak reed to lean on. "The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions."[34/] "Legislative silence cannot be viewed as an expression of congressional intent."[35/]

There is no basis for the Commission to draw any implication regarding Congress' views about the Commission's program access rules based upon Congressional inaction. There is nothing in the legislative history of the 1996 Act which indicates that Congress considered changes to the Commission's procedural rules in Section 628 proceedings. Rather, the Commission should look at

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33/ Time Warner Comments at 5; NCTA Comments at 6.

34/ Scripps-Howard Radio, Inc., v. Federal Communications Commission, 62 S. Ct. 875, 880 (1942); See also Girouard v. United States, 66 S. Ct. 826, 830 (1946).

35/ Whittaker v. Whittaker Corporation, 639 F.2d 516, 532 (9th Cir. 1981).

explicit statements by Members of Congress in 1997 expressing their clear frustration with the unacceptably slow pace of competition in the MVPD marketplace to discern congressional receptivity to the proposed changes.[36/]

B. This Is Not The Appropriate Place To Litigate Pending Program Access Complaints.

In its Opposition, Rainbow takes the opportunity to engage in extensive discussion of the pending Section 628 complaint filed against it by Americast. Ameritech strongly objects to the unfounded and untrue factual allegations found in Rainbow's Opposition, and they will be addressed in the proper forum. They are irrelevant, however, to the Commission's consideration of Ameritech's Petition.

VIII. CONCLUSION.

The record before the Commission developed in response to Ameritech's Petition demonstrates the need for the rules changes urged by Ameritech. The Petition enjoys broad support from competitors to cable and consumers and garners opposition only

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36/ At an April 10, 1997 Senate Commerce Committee hearing on the status of competition in the video marketplace, Chairman John McCain (R-AZ) made the following observation: "In sum, I remain concerned that competition in the multichannel video market today is not as vigorous as it will have to be to effectively constrain cable rates. Today, I hope to gain an insight on what must be done to assure that competition will measure up to the task by 1999." In addition, House Telecommunications, Trade and Consumer Protection Subcommittee Chairman Billy Tauzin (R-LA) recently announced his intention to hold a hearing on the status of competition in the video market. See, John Mercurio, Big Cable Company Cuts Deal to Carry C-Span. The Network of Congress, Battered by Supreme Court Decision, Wins 100% Coverage on TCI, Roll Call, May 5, 1997.

from the incumbent cable industry which is attempting to blunt the procompetitive force of Section 628. The Commission should take the opportunity afforded by this Petition to issue an NPRM, allowing development of a full record upon which to consider needed changes to its rules implementing Section 628, which will put the Commission squarely on the side of competition in the multichannel video programming distribution market. The Petition should be granted.

Respectfully submitted,

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July 17, 1997

CERTIFICATE OF SERVICE

I, Renee K. Kernan, a legal secretary with the law firm of Verner, Liipfert, Bernhard, McPherson & Hand, hereby certify that on this 17th day of July, 1997, I placed in the mail via first class, postage prepaid, copies of the foregoing Reply of Ameritech New Media, Inc., to the following:

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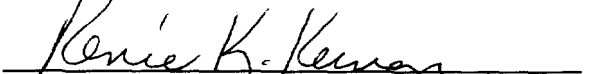

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